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Marcia L. McCormick

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Marcia L. McCormick†

I. INTRODUCTION

Every civil rights movement in the United States must struggle with how to allocate scarce resources to accomplish the broadest change possible. Most legal scholars and many non-lawyer activists have assumed that the law is the most powerful tool in this fight, and that the higher the level of institution and the more fundamental the law, the quicker and more effective that change will be. Thus, many lawyers and activists have concentrated the efforts of their movements on federal constitutional protections, the United States Supreme Court, national legislation, the federal courts, and then state level institutions, in descending order.

Notwithstanding this faith in the power of law, history suggests there are problems with this approach. Despite many legal victories at very high levels, change has been quite slow for the groups with these movements. Disillusioned at the lack of progress given the duration of struggle, some legal scholars and activists have looked for an explanation of the slow pace of change in legal terms—assuming that law could accomplish the change sought quickly and effectively—but failed because of defects in the law or the legal institution. Few have questioned the power of the law in the first place.

The purpose of this article is to explore why law, regardless of its form as common or positive law and regardless of its mode of operation, is a poor tool to create social change. In fact, the power of law

† Assistant Professor, Samford University, Cumberland School of Law. I owe thanks foremost to John O'Connell for his support and willingness to engage in endless discussions on this topic. This paper was first presented at the Gloucester 2006 conference, *"Too Pure an Air": Law and the Quest for Freedom, Justice, and Equality* jointly held by Texas Wesleyan University and the University of Gloucestershire, and I owe the participants there great thanks for their excellent suggestions. Thanks also to those who came to hear this presentation at the Southeastern Association of Law Schools annual meeting for the feedback they gave. And finally, thanks to Lisa Bashinsky for her research support. Any errors or weaknesses are mine alone. 515

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presents something of a paradox. The greater the power of the legal structure used, the less likely the result will produce change.

The primary reason for this paradox is a mismatch between the source of the problem and its solution. If the source of the social problem that created a rights movement was the law, then changing the law would solve the social problem. However, the source of the social problem is not the law, but instead is cultural belief. The law is often a tool to enforce that cultural belief. For example, where the law limits civil and political rights to certain groups, the law is just that: a tool that serves the belief. In fact, the law reflects those cultural beliefs.

For example, slavery in this country was made possible by the power of law that allowed and protected it in a number of ways. However, Black people, and not White people, were kept as slaves in this country because White people believed that Black people were different in ways that mattered. In other words, racial oppression existed in this country because the culture accepted racism as a cultural value. One modality of racist oppression in this country was slavery, but slavery was not the cause of that racism.[1]

For law to be an effective tool of change, then, law must remove the source of the problem. But the law simply cannot get at that source directly. A change in law does not immediately change beliefs,[2] and so a change in law cannot immediately right a social wrong. Going back to the analogy of the mirror, law is a reflection of cultural values, and changing that reflection does not alter the object being reflected.

Thus, although they seem quite powerful, high-level legal structures are constrained by the dominant culture. Without cultural change,

1. Certainly, the practice of race-based slavery would have perpetuated the cultural belief in White supremacy in a number of ways. The physical bondage and punishment of slaves in the context of White masters or slave dealers would have portrayed an image of the physical power of those masters and the lack of power of the Black slaves to anyone who saw or heard about it. The actions taken by masters to control their slaves would also have reinforced that feeling of power and superiority for those masters. The separate language of newly imported slaves, and their physical condition after enduring their torturous journey, would have also reinforced the view that these people were uneducated, uneducable, and savage by nature. Even after importation of new slaves was prohibited, all of the ways in which slaves could be controlled and treated differently from even the poorest Whites reinforced the notion of inherent difference and inferiority of the Black race.

2. An important caveat needs to be placed here. The law is a very powerful tool because we give it more power over us than other forms of knowledge and experience. *See* CAROL SMART, FEMINISM AND THE POWER OF LAW 10–11 (1989). Thus, the law has power to make people change their behavior, and to some extent it operates to shape beliefs. *See id.* at 11. However, where a legal expression clashes with other core values, people may resist the power of law and reject or subtly change it to fit with their other values. *See id.* at 24–25. This process is discussed in greater detail in part V. Theoretically, a culture or a legal system could operate differently to force change despite people's beliefs. *See e.g.*, RAY BRADBURY, FAHRENHEIT 451 (Random House 1991); GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949). That is certainly not a system that we would knowingly adopt in this country.

lawmaking through courts is not effective and can perpetuate oppression instead. Legislation can be more effective because it is more likely to embody the beliefs of a cultural majority, but it is subject to similar limits of culture in its enactment and interpretation. Paradoxically, the broader the subject of legislation and the higher the jurisdiction enacting the legislation, the less effective it will be. Because of these paradoxes of power, the temptation to focus on the most powerful institution, which can offer the staunchest protection and the broadest sweep in the United States—the Supreme Court and the Constitution—often wins out but may be the least effective means of making change. This paper explores why.

This paper will compare the history of two of the three major civil rights movements in the United States, comparing the victories and defeats, and their results. The movement for Black civil rights and for women's rights followed essentially the same pattern and used similar strategies. The gay and lesbian civil rights movement, on the other hand, followed some of the same strategies but has differed in significant ways.[3] Where each movement has attained success and where each has failed demonstrates the limits of American legal structures to effectuate social change.

II. THE GOAL OF RIGHTS MOVEMENTS: EQUALITY

Civil rights movements in the United States are forms of social movements: one way to use collective efforts to make some kind of a change in society.[4] Some social movements focus on changing individuals, while others focus on changing the social structure or social conditions.[5] Rights movements, by definition, are those social movements which seek to change the social structure or social conditions through the mechanism of the legal system by establishing a legally enforceable right.

The change that social movements seek to make is generally described by the term "equality."[6] However, it is impossible to make conclusions about the ability of law to achieve equality without defining first what equality means. There are two types of equality. The first type is sometimes called formal equality, and sometimes equality

3. Due to space limitations, development of the differences between the Black and women's rights movement on the one hand and the gay and lesbian rights movement on the other must wait for future work. I have tried to note some differences where I can. *See infra* notes 18, 76.

4. *See* Robert H. Lauer, *Introduction* to SOCIAL MOVEMENTS AND SOCIAL CHANGE, at xi, xiii (Robert H. Lauer ed., 1976).

5. *See* Robert H. Lauer, *Ideology and Strategies of Change: The Case of American Libertarians*, *in* SOCIAL MOVEMENTS AND SOCIAL CHANGE, *supra* note 4, at 92.

6. The goal could also be framed in terms of liberty or freedom. This paper focuses on equality because it encompasses liberty as well as freedom. The drive for liberty or freedom seems to be an attempt to share equally in the freedom and liberty of the privileged.

of rights or equal opportunity. In terms of the law, this refers either to the absence of classification or a mandate not to classify. The second form of equality is substantive equality or equality of results. It generally refers to equality in the distribution of goods, resources, and power.

In different societies at different points in history, governments have played a number of roles in the quest for equality. The American colonists were greatly influenced by the political philosophy of Locke, drawing principles from "natural law" and Aristotelian views of equality. Locke posited a law of nature that stood above human convention and that could be discerned through reason.[7] All people were equal in the sense that they possessed the same natural rights, and any inequality had to be justifiable, based on morally acceptable difference.[8] Locke also developed the notion that fundamental to human identity were privileges that other individuals and the government ought not impair, which he styled "rights."[9] Chief among these rights were the right to continue to live, the right to own personal property, and the right to act in ways that maximized life and property as long as the exercise of these rights did not interfere with others' rights to enjoy their lives and property.[10] The role of government, then, was to not frustrate the process of maximizing enjoyment of these rights. Translated into the American context, the correct social ordering would automatically follow if people were allowed to develop their abilities to the extent that nature would allow.[11]

Behind this theory of government is a view of equality first proposed by Aristotle. Aristotle argued that true equality required things (or people) that were the same to be treated alike, and things that were different to be treated differently.[12] Treating "sames" differently and "differents" alike resulted in inequality. This notion of equality, by itself, seems unproblematic. However, in practice, everything hinges on how sameness and difference are defined. For Aristotle, for example, women were different from men in the way that intellect

7. *See* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 12 (Basil Blackwell 1946); D.A. LLOYD THOMAS, LOCKE ON GOVERNMENT 16–17 (1995).

8. *See* LOCKE, *supra* note 7, at § 4.

9. *See id.* at §§ 6–7.

10. *See id.* at §§ 6–7, 25–51.

11. *See* Thomas Jefferson's First Inaugural Address, (Mar. 4, 1801), http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau1.htm ("[A] wise and frugal Government which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own . . . improvement . . . .").

12. ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE 145, 153, 265–67 (trans. F. H. Peters, 15th ed. 1904) (those who are equal should receive equal shares and those not equal should not). For United States cases adopting this framework, see for example, Barbier v. Connolly, 113 U.S. 27, 30–32 (1885).

differs from desire.[13] Thus, equality not only tolerated different treatment of women, it required that different treatment.

These theories were played out in the formation of the United States. The colonists created a government designed to promote freedom and equality for its male citizens, who perceived the greatest threat of oppression to come from governmental interference in individuals' lives. And so, the powers of the federal government were quite limited, and the government was structured to diffuse power and frustrate its exercise, all with a view that the lack of interference would allow individuals the greatest amount of freedom to realize their natural potential. Thus, the government's role in the citizens' lives was limited in order to allow each to develop to his natural potential. If some substantive inequality resulted, that inequality either was not a problem because it was created by nature and therefore legitimate and even right, or it was not a problem that government was properly concerned with. Thus, the colonists viewed the ideal society as one of formal equality.

However, at the same time the government was designed to promote the rights of citizens, it was also created to enforce oppression. The Constitution legitimized slavery by setting the number of representatives based on the number of free people and three-fifths of the number of "other [p]ersons."[14] And it further supported the institution by providing that

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[15]

And although it implicitly gave Congress the power to ban the international slave trade, it provided that Congress would not be able to do so before 1808 and further that the federal government could impose a tax on slaves imported.[16] It was not until the Thirteenth Amendment was added to the Constitution nearly one hundred years later that it stopped enforcing this oppression.[17]

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13. *See* Elizabeth V. Spelman, *Who's Who in the Polis*, *in* ENGENDERING ORIGINS: CRITICAL FEMINIST READINGS IN PLATO AND ARISTOTLE 99, 100–02 (Bat-Ami Bar On, ed., 1994); ARISTOTLE, *supra* note 12, at 265–66.

14. U.S. CONST. art. I, § 2, cl. 3.

15. *Id.* art. IV, § 2, cl. 3.

16. *Id.* art. I, § 9, cl. 1.

17. *Id.* amend. XIII, § 1. Michael Vorenberg suggests that slavery could have been abolished without amending the Constitution, but that Americans at the time chose that path in order to break with the past, and out of a recognition that the Constitution as written was flawed. MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 7 (2001).

III. The Evolution of the Black Rights Movement: The Model Movement

Many scholars have written excellent histories of the Black rights movement and the women's movement.[18] It is not possible here to detail those histories in anything approaching that richness, and this summary will reflect more unity in the movements than actually existed because of that. However, the broad outlines of that history tell us important things about the power of law.

This country was arguably founded as an exercise by a rights movement, which institutionalized individual rights as a founding principle. Rather than focus on that first movement, I want to focus on what is probably more universally regarded as a rights movement: the movement for Black rights.

The Black rights movement grew out of the antislavery movement, but the two were not necessarily synonymous. Many of those against the slave trade were not against slavery, and many against slavery believed that Black people were inherently inferior to Whites.[19] There was also, however, a small group that viewed Black people as equal, and who fought slavery, not just the slave trade, on that ground.[20]

From the beginning of the movement in the colonies and then the United States, the movement focused on structures of the law: the federal Constitution, state constitutions, and legislation, rather than on grassroots solutions.[21] When those proved ineffective, the movement moved back to the people, but at least some of these grassroots efforts were largely subverted by proslavery forces, and the movement

18. The history of the gay and lesbian rights movement contrasts with these, but space limitations prevent its inclusion. For good resources, see Barry D. Adam, The Rise of a Gay and Lesbian Movement (1987); John D'Emilio, Making Trouble: Essays on Gay History, Politics, and the University (1992); John D'Emilio, Sexual Politics, Sexual Communities (1983); Martin Duberman, Stonewall (1993); Lillian Faderman, Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America (1991); Jonathon Katz, Gay American History: Lesbians and Gay Men in the U.S.A. (Harper Colophon 1985); Eric Marcus, Making History: The Struggle for Gay and Lesbian Civil Rights 1945–1990 (1992). For a great documentary on the subject, see Out of the Past—The Struggle for Gay and Lesbian Rights in America (Allumination 1998).

19. *See* Robert William Fogel, Without Consent or Contract: The Rise and Fall of American Slavery 202–03, 241–43 (1989).

20. *See id.* at 204, 211, 251 (describing a group of Germantown Quakers who advocated an end to slavery based on the Golden Rule and the growth of that perspective among Quakers). The early abolitionist movement in Britain was extremely grassroots, focused on churches and local governments. Within 25 years, it was able to win a parliamentary victory to end the international slave trade, and within 50 years, it was able to emancipate all slaves in the British colonies and the West Indies. *Id.* at 208; *see also id.* at 211–12. This was a great success in a relatively short period of time.

21. *See id.* at 244–47.

withered.[22] However, with the rise of the religious-revival movement in the early nineteenth century, abolition gained ground.[23] The abolitionists focused their efforts on the members of their religious denominations, and although some efforts were aimed at legal solutions, most efforts focused on the power of the church to coerce change or to encourage people to voluntarily emancipate their slaves.[24] Leaders within the movement consciously chose not to pursue legal remedies, believing that the structure of the federal Constitution made this impossible.[25] Popular resistance to the abolitionist movement and violence against its participants attracted many powerful people to the movement.[26] Disillusionment with backlash and the lack of change caused some influential abolitionists to campaign to end discrimination against Blacks and against women.[27] They widely published a tract, culled from over 20,000 southern newspapers, describing the horrifying practices of average slave owners and the legal system that supported slavery, while portraying those practices as a natural outgrowth of power over another.[28]

As more time passed without the southern slave owners voluntarily ending the practice, abolitionists turned to federal legal solutions and helped form a new political party, the Republicans.[29] At the same time, federal legal institutions were used to enforce the institution of slavery including the fugitive slave laws, which were various laws that allowed the expansion of slavery into new territories, and the Supreme Court's *Dred Scott* decision.[30] The Republican Party gained the presidency in 1860, radicalizing northern voters on the antislavery position along the way.[31]

During the Civil War, the abolitionists shifted their strategy to the legal sphere, speaking before Congress and the President, and press-

22. *See id.* at 250–54 (describing the various grassroots efforts, particularly the colonization movement that antislavery advocates believed would undermine slavery in the South, but which actually reinforced the racism that supported slavery by removing free Blacks from any contact with enslaved Blacks).

23. *See id.* at 254, 264–69.

24. *See id.* at 269–76, 322–29.

25. *See id.* at 281–82.

26. *See id.* at 272–74.

27. *See id.* at 276–77.

28. *See id.* at 278. This tract was researched and written by Theodore Weld and his wife and sister-in-law, Angeline and Sarah Grimké, and is considered the most influential antebellum antislavery tract. *Id.*

29. *See id.* at 329–38, 345–47, 376–78.

30. *See id.* at 341–42. In *Scott v. Sandford*, 60 U.S. 393 (1857), the Supreme Court held that no Black person (free or enslaved) was a citizen of the United States and that the Missouri Compromise unconstitutionally deprived slave owners of their rights to property without due process of law, further suggesting that states could not ban slavery under the federal Constitution. *See* FOGEL, *supra* note 19, at 343 (citing Abraham Lincoln, Speech at the Republican State Convention (June 16, 1858) (known as the House Divided Speech)).

31. FOGEL, *supra* note 19, at 382–83.

ing emancipation legislation.[32] The progress of the War convinced Lincoln that he had to emancipate the slaves in the rebellious states to save the Union, and so he issued the Emancipation Proclamation.[33] Congress supported this move and required the abolition of slavery as a condition of statehood for West Virginia and by mandating that free Black men be enlisted in the armed forces.[34] Although Black soldiers were paid less, were segregated, had White commanders, and were not initially intended for combat, the performance of the troops helped break down some of the White prejudice in the North, prevalent at the time.[35]

During and after the Civil War, the radical Republicans, all abolitionists and many in favor of equal rights for Black people, had significant influence in the government.[36] Thus, the focus of the movement was on the structures of the law to accomplish emancipation.[37] Those who also desired racial equality hoped that it would follow from emancipation or from additional laws designed to promote equality.[38]

The first legal mechanisms created to address the civil and social inequality of Black people, and not simply emancipation, came at the end of the Civil War and during Reconstruction.[39] While there were

32. *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 495–96 (1988).

33. *See id.* at 557–59.

34. *See id.* at 562–65. Black soldiers had fought in the Revolutionary War and the War of 1812, and had also been enlisted in the Union Navy, but not the Union Army, prior to this mandate. *See id.* at 563.

35. *See id.* at 565, 686–87. The arming of free Blacks did not have the same effect on southerners, who instead retaliated against Black soldiers who had been caught, putting them at a higher risk of death than White soldiers. *See id.* at 566–67, 793–96.

36. *See id.* at 687–88, 805; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 28–41, 45–46 (1986) (describing the varying views of Republicans on equality for Blacks, but the essential unity when it came to Blacks and civil liberties guaranteed in the Bill of Rights).

37. *See* MCPHERSON, *supra* note 32, at 699–709, 712–13.

38. *See id.* at 701–02, 707, 716. *But see id.* at 709 (describing Lincoln's proclamation of amnesty and reconstruction, which contemplated a more active type of dependency and guardian arrangement).

39. Before this time, the role of the government was as an enforcer of inequality through positive law. Positive law in the states, for example, prohibited antislavery speech, prohibited the education of Black people, restricted the power of manumission, prohibited Black people from testifying in court, and prohibited free Black people from entering slave-holding and free western states. *See* THE RECONSTRUCTION AMENDMENTS' DEBATES ii–iv (Alfred Avins ed., 1967); CONG. GLOBE, 30th Cong., 2d Sess. 418–19 (1849), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 1–2; CONG. GLOBE, 31st Cong., 1st Sess. 123–24, 288–89, 482, 1654–64, 1674–78, 2066 (1850), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 3–10; CONG. GLOBE, 33d Cong., 1st Sess. 234, 240, 1012–13, 1155, 1556 (1854), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 11; CONG. GLOBE, 34th Cong., 1st Sess. 124, 1598 (1856), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 12; CONG. GLOBE, 34th Cong., 3d Sess. 140 (1857), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 12; CONG. GLOBE, 35th Cong., 1st Sess. 402, 1965–67 (1858), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 13; CONG. GLOBE, 35th Cong., 2d Sess.

some legal advances during the Civil War,[40] the most notable came after with the Thirteenth,[41] Fourteenth,[42] and Fifteenth[43] Amendments to the Constitution.

The Thirteenth Amendment was adopted in 1865 and abolished slavery.[44] However, Republicans quickly realized that emancipation would not be enough to give free Blacks even the most basic human rights. The southern legislatures passed Black Codes restricting free-

948, 951–53, 970, 974–75, 980, 982–87, 1006 (1859), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 14–19; CONG. GLOBE, 36th Cong., 1st Sess. 1677–87, 1839 (1860), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 20–29; CONG. GLOBE, 36th Cong., 2d Sess. 83–84 (1861), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at 29.

Similarly, federal law provided lower pay for Black soldiers and prohibited them from at least some federal employment. *See* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra*, at iv–v. The Supreme Court upheld this positive law and added another layer of legally enforced inequality. *See* Scott v. Sandford, 60 U.S. 393, 454 (1857) (holding that Black people were not citizens of the United States and therefore not entitled to the protection of the Privileges and Immunities Clause in art. IV, § 2 of the United States Constitution); Moore v. Illinois, 55 U.S. 6, 10 (1852) (upholding as constitutional a provision in the Illinois Constitution prohibiting the immigration to the state of free Black people).

40. For example, Massachusetts abolished racial segregation on streetcars and in schools. THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 39, at v; CONG. GLOBE, 38th Cong., 1st Sess. 3133 (1864), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 39, at 79. Additionally, Congress required the military to enlist Black soldiers. *See* MCPHERSON, *supra* note 32, at 562–65.

41. The relevant portion of the Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

42. The relevant portion of the Fourteenth Amendment provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives of Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, §§ 1–2.

43. The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

44. *See* U.S. CONST. amend. XIII.

dom of movement, the right to own property, freedom of contract, freedom of assembly, and the right to bear arms, all by imposing special penal laws applicable only to Blacks and by controlling Black labor to the extent that the conditions of work were barely distinguishable from enslavement.[45] Republicans also hoped to avoid a political revolution. The Thirteenth Amendment annulled the Three-Fifths Clause of the Constitution, so that the former slave states, heavily Democrat, would nearly double their share of representatives in the House.[46] Black voters, who presumably would vote Republican, could offset that.

Thus, to guarantee all of the rights of citizenship to Blacks, to be absolutely clear that the Bill of Rights restricted the states, and to ensure that representatives were apportioned based on those who could vote, the Fourteenth Amendment was adopted.[47] Despite the reference to voting in Section two, however, the Fourteenth Amendment did not mandate by its language that Blacks be given the franchise.[48] Congress required southern states to permit Blacks to vote on the same terms as Whites in the Reconstruction Act, and for a short period, this led to a transformation in politics in some states and heavy Black political participation.[49] Northern states were not required to enfranchise Blacks, though, the Republicans—beginning to lose power—pushed ahead to enact the Fifteenth Amendment, prohibiting discrimination in the right to vote on the basis of race, color, or previous condition of servitude.[50]

The effect of these Amendments was quickly narrowed through Supreme Court decisions,[51] state legislation,[52] and terrorism.[53] Al-

45. *See* CURTIS, *supra* note 36, at 35; *id.* at 45–49 (describing the Republican belief that the Thirteenth Amendment made the freed slaves citizens of the United States).

46. *See id.* at 45–49.

47. *See id.* at 26–130 (analyzing in detail the Republican view of history and political theory, and critiquing legal historian arguments that the Fourteenth Amendment did not incorporate the Bill of Rights).

48. *See* U.S. CONST. amend. XIV, § 2. That section merely linked the number of representatives to those able to vote rather than to the whole population. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 90–91 (2000).

49. *See* KEYSSAR, *supra* note 48, at 92–93; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 10 (2004).

50. U.S. CONST. amend. XV; *see* KEYSSAR, *supra* note 48, at 93–94; KLARMAN, *supra* note 49, at 10. The right to vote for people of color has been supported by two further key pieces of legislation: the Twenty-fourth Amendment, prohibiting poll taxes; U.S. CONST. amend. XXIV; and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (current version codified at 42 U.S.C. §§ 1973 through 1973bb-1 (2000)), *amended by* The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

51. In the *Slaughterhouse Cases*, 83 U.S. 36, 74 (1873), the Court held that the Fourteenth Amendment protected only the rights that owed their existence to the federal government and not some broader definition of "privileges and immunities." *See* PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME

though Congress initially fought encroachments of Black rights with

COURT AND THE PRODUCTION OF HISTORICAL TRUTH 66–68 (1999) (explaining how Supreme Court decisions after the passage of the Reconstruction Amendments narrowed the effect of those amendments). The Court also held that the Thirteenth Amendment was relevant only in cases of chattel slavery. VORENBERG, *supra* note 17, at 240.

Subsequent to the *Slaughterhouse Cases*, Congress passed the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations. 18 Stat. 335. The Supreme Court found that neither the Thirteenth nor Fourteenth amendments gave Congress the power to enact this law. Civil Rights Cases, 109 U.S. 3, 11–12, 17–18, 22–23 (1883). The Court found that Congress lacked the power under the Thirteenth Amendment because it found that the Thirteenth Amendment granted only the right to be free from the most literal forms of slavery. *See id.* at 22–23. Congress had a wide view of its power under the Thirteenth Amendment to erase the "badges and incidents" of slavery, and the Court's narrower view created lasting impediments to racial equality because slavery in the United States was based on a belief that Black people were inferior:

> Slavery as an economic system was of small account compared with slavery as a system of racial adjustment and social control. . . . Slavery was not the source of the philosophy [of the biological inequality and the racial inferiority of the Negro]. It merely enshrined it, prevented a practical demonstration of its falsity, and filled public offices and the councils of religious, educational, and political institutions with men reared in its atmosphere. . . . The defense of slavery was of a social system and a system of racial adjustment, not of an economic institution.

MILTON R. KONVITZ, A CENTURY OF CIVIL RIGHTS 10 (1961) (quoting DWIGHT L. DUMOND, ANTISLAVERY ORIGINS OF THE CIVIL WAR IN THE U.S. 1 n.1, 52 (1939)) (alterations in original and footnotes omitted).

The Fourteenth Amendment was also viewed narrowly by the Court in the *Civil Rights Cases*, 109 U.S. at 24–25, which held that Congress had the power under it to restrain only state and not private actors. Scholars have criticized the *Slaughterhouse Cases* and the *Civil Rights Cases* as eviscerating the purpose of the Amendments. *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 1863–1877, at 222–27 (1990); VORENBERG, *supra* note 17, at 240–42; Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 438–39 (2003).

The Fifteenth Amendment has never been applied outside of the voting rights context. Congress, however, had a rather broad view of its power within the voting rights context. It enacted a law almost immediately after passage of the Fifteenth Amendment that, among other things, prohibited private parties from trying to interfere with anyone's exercise of the right to vote. *See* Force Act of 1870, § 4, 16 Stat. 141. The proponent of that provision argued that Congress had the power to enact any legislation that would protect against the States' failure to prevent interference with the right to vote. *See* CONG. GLOBE, 41st Cong., 2d Sess. 3611–13 (1870) (comments and amendment of Sen. Pool), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 39, at 447–48. In other words, Congress had the power and the duty to enact positive protections to ensure that people could actually exercise the right to vote.

52. For example, in the early 1870s, states reorganized districts and precincts, closed polling places, and imposed financial and other requirements all to inhibit Blacks from voting. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 422–23 (1988); KLARMAN, *supra* note 49, at 10–11. Other legislation, along with applications of government power, also limited Black rights. *See id.*

53. *See* KLARMAN, *supra* note 49, at 10. The primary enforcer of terrorism was the Ku Klux Klan, which essentially was a paramilitary wing of the Democratic Party. *See* FONER, *supra* note 52, at 424–35, 559–60.

legislation that state and local officials could use to oppose those encroachments, by the mid-1870s, northern Republicans lost the political will to continue to police the South, and federal efforts tapered off.[54] In 1876, the presidential race was too close to declare a winner, and the office was given to Republican Rutherford B. Hayes as part of a compromise that ended Reconstruction and left southern Blacks at the mercy of southern Whites.[55]

Few efforts were made until the mid-twentieth century to address discrimination through law.[56] Members of the Black rights movement mostly turned inward. In 1895, for example, Booker T. Washington accepted the status quo and urged fellow Blacks instead to pursue education and economic advancement.[57] There was a split in the movement, even among the lawyers, between using the tools of the law to attack discrimination, and relying on informal voluntary arrangements to promote education, develop civic institutions, and develop economic resources.[58] "Race uplift," autonomy, and cooperation became the focus of much of the movement.[59]

The leaders of the Black rights movement in the early half of the twentieth century did focus some efforts on the structures of the law

54. *See* FONER, *supra* note 52 at 454–57, 558, 586; KLARMAN, *supra* note 49, at 10. Congress enacted several civil rights statutes: Civil Rights Act of 1866, ch. 31, §§ 1–10, 14 Stat. 27 (declaring that all persons born in the United States, except Native Americans, are citizens and have the same rights as those enjoyed by white citizens); Force Act of 1870, ch. 114, §§ 23, 16 Stat. 140 (enforcing the right of citizens of the United States to vote in the several states); Ku Klux Act of 1871, ch. 99, §§ 2–19, 16 Stat. 433 (enforcing the right of all citizens to vote in the several states); Act of Apr. 20, 1871, ch. 22, §§ 1–7, 17 Stat. 13 (providing the means to enforce the provisions of the Fouteenth Amendment); Act of Mar. 1, 1875, Ch. 114, §§ 1–5, 18 Stat. 335 (granting full and equal enjoyment of inns, public conveyances, theaters, etc. to all citizens, regardless of race or color).

55. *See* Clarence Hooker, *Compromise of 1877*, *in* ENCYCLOPEDIA OF AFRICAN-AMERICAN CIVIL RIGHTS: FROM EMANCIPATION TO THE PRESENT 123 (Charles D. Lowery & John F. Marszalek eds., 1992); C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (1951).

56. The federal movement for racial equality was abandoned in 1877, and most of the reconstruction legislation repealed in 1894. KONVITZ, *supra* note 51, at 66, 69. In addition, other than the Nineteenth Amendment, adopted in 1920, which provided that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex," U.S. CONST. amend. XIX, § 1, further national efforts to address social inequality were generally unsuccessful. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896). There were some states, however, that passed civil rights legislation. *See* KONVITZ, *supra* note 51, at 130.

57. KLARMAN, *supra* note 49, at 3.

58. *See* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 272–80 (2005); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 21–33, 82–104 (1987).

59. *See* Mack, *supra* note 58, at 277–80. Despite the inward-looking nature of the uplift strategy, it was essentially assimilationist and could be viewed as simply a step in a legalist strategy. If Black people had the same socio-economic profile, and the same kinds of civic institutions as White people, then they deserved the same rights as White people. *See id.* at 282–83, 296–97.

and on litigation in particular, but they saw it as simply one part of a broad strategy aimed at public opinion and the structures of oppression.[60] When the National Association for the Advancement of Colored People (NAACP) was formed in the early twentieth century, it deployed legal advocacy and some litigation, and eventually created a legal department.[61] The strategic mission of the legal department was to attack racial discrimination in education.[62]

The NAACP began its litigation campaign by attacking inequities in higher education and won several victories.[63] That campaign included a national public awareness campaign in addition to the litigation.[64] Additionally, other forces raised public awareness of the second class status of Blacks in the United States. Gunnar Myrdal, a sociologist, published a comprehensive study of Black people in the United States that became widely influential,[65] and World War II itself highlighted the injustice of racial apartheid in the United States when compared to the policies of Nazi Germany.[66] Cold War propaganda and White backlash, too, put racism in the spotlight and made the federal government committed to equality.[67]

Generally perceived as a great victory of litigation, the Supreme Court decided *Brown v. Board of Education* in 1954, and declared that racial segregation in schools violated the Equal Protection Clause.[68] After *Brown* helped set the stage,[69] and when activists un-

60. *See id.* at 349–51.

61. *See* TUSHNET, *supra* note 58, at 1–2. The NAACP's legal program began as a piecemeal project, and not as a coordinated strategy. *See* GILBERT JONAS, FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909–1969, at 34–41 (2005) (detailing the NAACP's involvement in litigation up to 1934 when it established a legal department).

62. *See* JONAS, *supra* note 61, at 42. Originally, the strategy also included attacking discrimination in transportation, but Charles Hamilton Houston, the director, had to limit the strategy due to the lack of financial resources. *See id.*

63. *See id.* at 43–45. Those cases included *Pearson v. Murray*, 182 A. 590 (Md. 1936), and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), among others.

64. *See* JONAS, *supra* note 61, at 45; KLARMAN, *supra* note 49, at 164–65 (noting that Houston and Thurgood Marshall both understood the limitations of litigation in creating social change and saw the need for organizing local communities).

65. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (Transaction Publishers 1996).

66. *See* KLARMAN, *supra* note 49, at 176–77, 180.

67. *See id.* at 182–86.

68. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

69. Arguably, President Truman's Committee on Civil Rights, formed in late 1946, set the stage both for *Brown* and for subsequent legislation. *See* KONVITZ, *supra* note 51, at 70–72 (citing PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947)). In its report, the Committee recommended "[t]he elimination of segregation, based on race, color, creed, or national origin, from American life," reasoning that:

> The separate but equal doctrine has failed in three important respects. First, it is inconsistent with the fundamental equalitarianism of the American way of life in that it marks groups with the brand of inferior status. Secondly, where it has been followed, the results have been separate and unequal facil-

dertook massive efforts at civil disobedience to integrate public accommodations,[70] Congress began passing antidiscrimination legislation again in 1957.[71] It passed a second civil rights act in 1960[72] and finally enacted the most sweeping and widely used antidiscrimination legislation in 1964.[73]

A model legal strategy for civil rights movements evolved out of this history.[74] After an initial period of dawning group awareness and local and national activism that resulted in an organized, coherent movement, a group seeking greater civil rights would focus its energies at the federal level by seeking a declaration from the Supreme Court that particular discriminatory practices violated the Constitution.[75] If that top-down approach was not successful, the group would seek a constitutional amendment and/or federal legislation outlawing

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> ities for minority peoples. Finally, it has kept people apart despite incontrovertible evidence that an environment favorable to civil rights is fostered whenever groups are permitted to live and work together. There is no adequate defense of segregation.

Id. at 72 (quoting PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS, *supra*).

Additionally, President Eisenhower vowed to end segregation in the District of Columbia, and the Supreme Court considered segregation cases from the District before cases involving the same issues in the states. *See id.* at 123.

70. *See id.* at 136–52; *See generally* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) (describing the interplay between the civil disobedience and the eventual passage of the Civil Rights Act of 1964).

71. *See* Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634. The bill passed after numerous compromises and after a one-person demonstration in the nature of a filibuster by Senator Strom Thurmond, which lasted over twenty-four hours. *See* KONVITZ, *supra* note 51, at 75.

Among other things, the Civil Rights Act of 1957 created a federal Commission on Civil Rights, which was to investigate allegations of discrimination in voting and other denials of equal protection, and which was to advise the federal government on equal protection issues. § 104, 71 Stat. at 635. The Commission was to last only two years. *Id.* The act focused primarily on enforcement of voting rights. *See id.* at § 131, 637–38. It was very modest, and disappointed liberals as too little and southerners as too much. *See* KONVITZ, *supra* note 51, at 78.

The Commission issued its report in 1959, and found widespread discrimination in voting, education, and housing. REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1959), http://www.law.umaryland.edu/Marshall/usccr/documents/cr1195.pdf. The report also noted the complex interrelationships of these kinds of discrimination, and noted that Black Americans had become a sort of permanent "demoralized" underclass. *See id.* at 545–46, 548.

72. This act was another modest one, due in part to a filibuster and other delay tactics that lasted eight weeks. *See* KONVITZ, *supra* note 51, at 84–89.

73. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the Code).

74. Of course the history of the Black rights movement does not end there, but continues, using the same general strategies of litigation, legislation, civil disobedience, and public education.

75. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (considering constitutional protection for disabled persons); Bowers v. Hardwick, 478 U.S. 186 (1986) (seeking constitutional protection for gays and lesbians); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (concerning constitutional protection based on older

the practices.[76] If those efforts were unsuccessful or struck down by the courts, the group would head to the states or more local bodies to try the same tactics and more grassroots efforts there.[77] After some time and state or local successes, the group would again focus its efforts on the federal government, beginning with the Supreme Court and repeating the process.[78]

The women's movement was the first to adopt the strategy used by the Black rights movement.[79] The women's rights movement, to some extent was born of the abolitionist movement, but began in a more

age); Bradwell v. Illinois, 83 U.S. 130 (1872) (concerning litigation by the women's movement, seeking constitutional protection).

76. For example, women won the right to vote in 1920 with the Nineteenth Amendment. U.S. CONST. amend XIX. The anti-age-discrimination movement won passage of the Age Discrimination in Employment Act (ADEA) in 1967. 29 U.S.C. §§ 621–34 (2000). And, the disability rights movement won passage of the Americans with Disabilities Act (ADA) in 1990. 42 U.S.C. §§ 12101–12213 (2000).

The gay and lesbian civil rights movement, on the other hand, went straight to the states and local communities after the defeat in *Bowers* and also focused on non-legal institutions. *See* MARCUS, *supra* note 18. Arguably, gays and lesbians have had much greater success gaining acceptance in a shorter period of time. For example, the Supreme Court took only seventeen years to overrule *Bowers*, in *Lawrence v. Texas*, 539 U.S. 558 (2003), whereas it took nearly sixty years to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896), and almost one hundred to apply heightened scrutiny to women after *Bradwell*. Further development of this contrast must wait for a future project.

77. After unsuccessful efforts at federal legislation, the Black civil rights movement focused its attention on the states and won passage of some civil rights laws. *See* KONVITZ, *supra* note 51, at 130. Similarly, after *Bowers*, the gay and lesbian civil rights movement focused on gaining rights in state and local communities. *See* MARCUS, *supra* note 18, at 406.

78. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (sexual orientation); Reed v. Reed, 404 U.S. 71 (1971) (gender); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (race).

79. Although the Reconstruction Amendments are viewed generally as instruments of racial equality, the abolitionist and women's rights movements were intertwined, and many members from both movements hoped that the Reconstruction Amendments would advance women's rights, as well. *See* CONG. GLOBE, 40th Cong., 3d Sess. 708–10 (1869), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 39, at 346 (amendment proposed by Senator Pomeroy to grant suffrage to all citizens including women); FONER, *supra* note 51, at 115; NELL IRVIN PAINTER, SOJOURNER TRUTH 220–33 (1996) (describing the overlap and the role Sojourner Truth played in both movements); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 151, 162 (David Kairys ed., 1990). *But see* Françoise Basch, *Women's Rights and Suffrage in the United States, 1848–1920*, *in* POLITICAL AND HISTORICAL ENCYCLOPEDIA OF WOMEN 289, 291 (Christine Fauré ed., 2003) (detailing the way that women were marginalized in the abolitionist movement).

One reason that the groups were intertwined was that women were active in the abolitionist movement; women were allowed to engage in social movements, although not to speak publicly, as a natural extension of the female "sphere," even where they were not allowed into most areas of public life. *See* Taub & Schneider, *supra* at 162. Another reason for the connection could be that the mechanisms of oppression on the basis of sex reinforced the mechanisms of racial oppression and vice versa. In other words, distinctions based on sex were well accepted and were used to justify distinctions made on race and color. *See* KONVITZ, *supra* note 51, at 128. A third reason is likely the fact that many activists were also members of religious groups that emphasized equality of all persons. *See* FOGEL, *supra* note 19, at 204, 211; LYNN SHERR,

separate and formal way with a convention in Seneca Falls, New York in 1848. At the convention, a "Declaration of Sentiments and Resolutions" was presented, detailing the ways in which women were oppressed by men as a legal and practical matter and asserting that women had natural rights equal to those of men.[80] However, even before then, activists had begun to lobby for reform of the laws governing married women, going door-to-door and collecting signatures to petition state legislatures for change.[81]

The members of the women's movement had been allied with the abolitionist movement, but significant tension developed between members of the two movements during Reconstruction when some abolitionists advocated a push for rights for civil and political rights for Black men, but not for women.[82] The women's movement will always be tainted by the racist rhetoric that conflict produced and the alliance formed by one branch of the women's movement with a racist Democrat involved in a political struggle over suffrage in Kansas.[83] Out of this conflict, grew two separate women's groups with different strategies: the National Woman Suffrage Association focused on achieving federal voting rights through a constitutional amendment and also aimed at wholesale societal change; the American Woman

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FAILURE IS IMPOSSIBLE: SUSAN B. ANTHONY IN HER OWN WORDS xix, 29 (1995); Basch, *supra*, at 289–91.

80. Basch, *supra* note 79, at 292; The Seneca Falls Declaration (1848), http://www.vlib.us/amdocs/texts/seneca.html (last visited Feb. 17, 2006).

81. *See* Basch, *supra* note 79, at 292–93. These women faced significant hostility, often from other women, but did succeed in changing some states' property laws. That, in turn, led to some changes in the laws governing child custody and legal identity. *See id.* at 293.

82. *See* SHERR, *supra* note 79, at 39–41 (reproducing a debate between Frederick Douglass and Susan B. Anthony of the American Equal Rights Association in 1869); Basch, *supra* note 79, at 294–95. Black women in both movements were somewhat torn because they were disempowered by both strategies. *See* PAINTER, *supra* note 79, at 221–33 (describing the positions and arguments of Sojourner Truth and Frances Ellen Watkins Harper).

The debate and subsequent failure of the women's movement at that time may have helped solidify a theoretical division between protected classes. This categorizing creates tension when a person is a member of more than one disempowered class. Black women may be treated differently from all men and differently from non-Black women. Thus, they may be subject to discrimination because they are Black women, and not simply because they are Black, and not simply because they are women. Stereotypes of Black women differ from those of Black men and from those of non-Black women. However, under our legal categories, this is often found not to be discrimination because they are not discriminated against because of their sex by itself, and they are not discriminated against because of their race by itself. *See* PAINTER, *supra* note 79, at 224–25; *see also* RACE-*ing* Justice, *En*-gender*ing* Power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality (Toni Morrison ed., 1992) (describing the interplay between race and sex in the controversy surrounding Anita Hill and the appointment of Clarence Thomas).

83. *See* PAINTER, *supra* note 79, at 228–32; Basch, *supra* note 79, at 294–95. 530

Suffrage Association focused on suffrage, first for Black men and later for all women, and advocated state-by-state campaigns.[84]

And so, nearly from the beginning, members of the women's movement used their organizational strategies to focus on the mechanisms of the law to achieve change. Similarly, the women's movement was relatively quick to turn to litigation, trying to have the courts declare that women were entitled to equal rights, including equal voting rights under the Privileges and Immunities Clause of the Fourteenth Amendment.[85]

But, also from the start, the women's movement was less cohesive than the Black rights movement, and groups of women more often focused on goals that would not, today, be naturally associated with the advancement of women's equality, like the prohibition of alcohol, the abolition of child labor, reform of the penal system, consumer protection, and public health and safety.[86] At the same time, women were engaging in social work on a larger scale, as in Jane Addams' Settlement Movement.[87] This diffuse focus, particularly in the late

84. Basch, *supra* note 79, at 295.

85. *See id.* at 296 (recounting the constitutional argument put forth by Victoria Woodhull and the prosecution of Susan B. Anthony for voting in 1872); *see also* Bradwell v. Illinois, 83 U.S. 130 (1872) (holding that states did not have to allow women to practice law); Minor v. Happersett, 88 U.S. 162 (1874) (holding that the Fourteenth Amendment did not require that women have a right to vote equal to that of men).

Despite the tension described above, some members of both movements had argued that the Fourteenth Amendment should be drafted to grant equal rights for women, as well as for Blacks. In a setback to that hope, the Amendment was adopted with the word "male" used in Section 2, which provided that representation in Congress would be restricted for any state where the franchise was abridged for "any . . . male inhabitants . . . , being twenty-one years of age, and citizens of the United States," U.S. CONST. amend. XIV, § 2, and the Fifteenth Amendment failed to specify that the vote could not be denied on the basis of sex, U.S. CONST. amend. XIV, § 1. *See also* FONER, *supra* note 51, at 115, 192–93. This marked the first time that gender was introduced into the Constitution. *See* H.R. REP. NO. 41–22 (1871) (reporting the majority view that the Fourteenth Amendment did not prohibit discrimination against women in exercising the right to vote, and the minority view that disagreed on the ground that voting was a privilege and immunity of citizenship), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 39, at 466–71; S. REP. NO. 42-21 (1872) (reporting the unanimous view of the Senate that the Fourteenth and Fifteenth Amendments did not give women the right to vote and that denial of woman-suffrage did not result in an anti-republican form of government), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES, *supra* note 39, at 571–73.

Regardless of the language in section 2, members of the women's movement argued that Section 1 of the Fourteenth Amendment, which provided that all citizens get equal protection of the laws, required that women have a right to vote whenever men had that right. *See Minor*, 88 U.S. at 165; Basch, *supra*, at 296. The Supreme Court rejected that argument, reasoning that the right to vote was not an automatic privilege of citizenship. *See Minor*, 88 U.S. at 170–78.

86. *See* Basch, *supra* note 79, at 298–99. The women's movement also allied with causes that were more obviously related, like the socialist movement, the labor movement, and the abolition of prostitution. *See id.* at 296, 298–300.

87. *Id.* at 299.

nineteenth century, was fostered in part by the underlying premise that women were morally superior to men.[88]

It was also fostered in part by the heterogeneity of women. For example, women workers of all colors saw little utility in the right to vote, having achieved some successes by using the economic weapon of the strike, and could not identify with some of the upper class White women active in that movement.[89] Again from the start, the interplay of race, class, and sex have posed obstacles to solidarity within the movement and to success for any but the most affluent White women.

Notwithstanding these obstacles, at the turn of the century and the beginning of the twentieth century, the various branches of the women's movement achieved some successes, and some efforts to empower women as women were advanced. For example, the reproductive rights branch of the women's movement was born in Margaret Sanger's efforts to promote sex education and birth control.[90] Additionally, the suffrage branch of the movement gained ground as well, and its activities increased in the early part of the twentieth century, as the two suffrage associations merged and decided to focus solely on suffrage at the state level.[91] Just before World War I, the group split again when the more radical Alice Paul formed the National Women's Party to lobby for a federal constitutional amendment giving women the vote.[92] The National Women's Party capitalized on the wartime propaganda to show that the rhetoric of spreading democracy was hypocritical when women could not vote at home, and this, combined with media coverage of the torture in prison of members of the group who were arrested for protesting, led to the adoption of the Nineteenth Amendment in 1920.[93]

After adoption of the Nineteenth Amendment, the strategies of the various strands of the women's movement were very legalistic. The National Women's Party focused its energies on lobbying for an equal rights amendment.[94] The labor branch of the women's movement continued to push for protective legislation and to defend the constitutionality of that legislation.[95] Another branch of the women's move-

88. *Id.* at 298.
89. *See id.* at 300.
90. *See id.* at 298–99.
91. *See id.* at 301.
92. *Id.* at 302.
93. *See id.* at 302–03; U.S. CONST. amend. XIX. A really fabulous film about this part of the movement is IRON JAWED ANGELS (HBO Films 2004).
94. *See* MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 44, 57 (1988). At the same time, another movement in which women played a large role, the anti-child labor movement, also pursued legislation and a constitutional amendment to prohibit child labor. *See id.* at 45–55.
95. *See id.* at 57. In 1908, the Supreme Court had upheld protective labor legislation limiting the hours women could work on the not very feminist grounds that

ment focused on reform of laws governing sexual violence.[96] And finally, a fourth branch focused on reform or repeal of laws governing contraception and abortion.[97]

The women's movement has generally maintained this focus on the structures of law, nearly exclusively, and, like the NAACP, women formed an organization dedicated to lobbying and litigation: the National Organization of Women, which had its own legal department, the Women's Rights Project.[98] Efforts to ratify the Equal Rights Amendment failed,[99] but women achieved victories in national legisla-

protected the health of future generations. *See* Muller v. Oregon, 208 U.S. 412 (1908). Shortly after the Nineteenth Amendment was adopted, the Court shifted gears a bit, striking down a minimum wage law for women as inconsistent with women's equal freedom of contract. *See* Adkins v. Children's Hosp., 261 U.S. 525 (1923). The National Women's Party had filed an amicus brief in that case, arguing for the protection principle to be discarded and the equality principle to be upheld. *See* BERRY, *supra* note 94, at 57–58. That case paved the way for *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which the Court overruled *Adkins*, and upheld minimum wage legislation for both men and women.

96. *See* William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 301–11, 318–32 (1993) (detailing the women's interests and laws relating to sex).

97. Beginning in the last half of the nineteenth century, abortion became widely criminalized, in part because middle class married women were widely using the practice, and in part because of the efforts of male doctors to professionalize the medical system and take control over women's bodies. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 170–75 (1985). Similarly, in the last third of the nineteenth century, distributing contraception or information about it became a crime. *See id.* at 175–78.

Litigation played a role in the movement in the early twentieth century, primarily as a defensive tool. Margaret Sanger, widely regarded as the mother of the birth control movement, was prosecuted for distributing contraception, and argued to the Supreme Court that the laws violated women's rights to life and liberty by depriving them of control over their bodies and their sexuality. *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2118–20 (2002). Beginning with Sanger's case, however, judges weakened the laws limiting distribution of sexual education materials and of contraception provided by doctors. *See id.* at 2120–21.

98. *See* BERRY, *supra* note 94, at 61–62; Eskridge, *supra* note 97, at 2130.

99. The Amendment passed in Congress in 1972. BERRY, *supra* note 94, at 63. It included a time limit for ratification of March 22, 1979. *Id.* at 64. Twenty-two state legislatures ratified the Amendment that same year, but by November 1978, only 13 more states had ratified it, and four of the original 22 had purported to rescind approval. *Id.* at 65; *see also id.* at 71–73 (articulating questions about the constitutional validity of an attempt to rescind a ratification). In 1978, by a simple majority Congress passed legislation to extend the time for ratification, which may or may not have been valid as a constitutional matter. *Id.* at 70. *Compare* Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875 (1980) (arguing that the extension was not constitutional) *with* Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979) (arguing that the extension was constitutional). However, even with the extension until June 30, 1982, no further states ratified it. *See* BERRY, *supra* note 94, at 74–81.

tion through the Equal Pay Act,[100] the Civil Rights Act of 1964,[101] and Title IX of the Education Amendments of 1972,[102] and also in constitutional protection through Supreme Court decisions.[103] Women also achieved some reforms at the state level through legislation and court decisions.[104]

100. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206 (2000)).

101. *See* Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of the United States Code). Originally, Title VII of the Civil Rights Act of 1964 was to prohibit discrimination on the basis of race. However, as a last-minute amendment by a southern Democrat, proposed as a means to defeat the bill, sex was added to the list of prohibited classifications. *See* 110 CONG. REC. H2577–84 (1964). Even though the proponent thought that the inclusion of sex would defeat the bill, Representative Martha Griffiths (D. Mich.) urged liberal groups to support the amendment, reasoning that some conservatives would vote for it because of its proponent, and she could persuade other members of Congress to join in. *See* BERRY, *supra* note 94, at 61.

102. The less well-known name of this act is the Patsy Takemoto Mink Equal Opportunity in Education Act, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified at 20 U.S.C. §§ 1681–88 (2000)).

103. These constitutional protections include the liberty protections in the reproductive rights cases, some examples of which, in the order that they were decided, include: Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that the states could not prohibit contraception for married couples); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending *Griswold* to all individuals); Roe v. Wade, 410 U.S. 113 (1973) (recognizing the right of women to control their bodies and choose abortion in the first trimester of pregnancy); Doe v. Bolton, 410 U.S. 179 (1973) (same).

These constitutional protections also include the equal protection cases, some examples of which include, in the order they were decided: Reed v. Reed, 404 U.S. 71 (1971) (striking down a male preference in estate administration on grounds that it was arbitrary); Frontiero v. Richardson, 411 U.S. 677 (1973) (applying strict judicial scrutiny under *Reed* to require that benefits for dependent spouses of female service members be the same as for dependent spouses of male service members); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a tax break for widows as appropriately remedial even if not formally equal); Stanton v. Stanton, 421 U.S. 7 (1975) (discussing child support termination for girls); Taylor v. Louisiana, 419 U.S. 522 (1975) (requiring that women be included in jury pools); Craig v. Boren, 429 U.S. 190 (1976) (adopting intermediate scrutiny for gender classifications).

One legal defeat during this period was *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which the Court held that even though only women could be pregnant, because not all women are, discrimination on the basis of pregnancy was not discrimination on the basis of sex. *See also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (applying *Geduldig* to Title VII). Congress enacted the Pregnancy Discrimination Act of 1978 in direct response to *Gilbert*, making explicit that under Title VII, discrimination on the basis of pregnancy was discrimination on the basis of sex. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)).

104. *See* Leigh Bienen, *Rape III—National Development in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 185 (1980) (summarizing rape reform laws in the seventies); Eskridge, *supra* note 97, at 2131 (detailing equality victories in state courts); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017 (2000) (reviewing family law reform); Lisa G. Lerman & Sharon Goldzweig, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RTS. L. REP. 271 (1980) (surveying legislation to protect battered women); Nicholas

The paradigm strategy of moving from the top down was probably chosen by women's rights groups and others based on the apparent victories of the Black rights movement and to maximize the effect of group resources.[105] There is only one federal government, while there are 50 state governments, and thousands of smaller government bodies. So focusing on the federal government allows greater concentration of resources. Additionally, when the highest court of any jurisdiction declares that the jurisdiction's constitution requires a certain action, that declaration provides the most absolute protection. For example, if the United States Supreme Court finds that the Constitution recognizes and protects a particular right, then no government within the United States may restrict that right, and government bodies will be empowered to prohibit private parties from restricting the right as well. Even if the right itself is not grounded in a constitution, a legislature may still have the power to recognize and protect the right under a more general type of power. And so even if the group is more likely to get a good result at a more local level, for maximum effect, it makes sense to focus resources first on the United States Supreme Court, then Congress, then individual state supreme courts, then individual state legislatures, and then more local government bodies.[106]

IV. CURRENT STATUS OF BLACKS AND WOMEN

For some time, legal scholars have debated the utility of seeking protection from the Supreme Court and the propriety of Court-created protections in the Constitution for groups or actions. Some of that argument has focused on whether the Court causes social change or simply reflects changes that have already happened.[107] Some scholars have suggested that the courts, particularly the Supreme Court, have relatively little power to make change, and that real change can

H. Wolfinger, *The Mixed Blessings of No-Fault Divorce*, 4 WHITTIER J. CHILD & FAM. ADVOC. 407 (2005) (describing the reform of divorce law).

105. That was certainly one reason that the National Women's Party focused on a federal constitutional amendment after the AWSA and the later-formed National American Woman Suffrage Association had so little success but expended so much energy at the state level. *See* Basch, *supra* note 79, at 302–03.

106. *See* Eskridge, *supra* note 97, at 2156. Eskridge also notes that federal victories are more likely to "redistribute power toward women" in part because local governments are too afraid that redistribution will cause traditionally empowered groups to leave the locality in protest. *See id.* at 2156 & n.485 (citing PAUL PETERSON, THE PRICE OF FEDERALISM (1995)).

107. *See* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 192–209 (1978); KLARMAN, *supra* note 49, at 5–7; LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz, ed., 1998); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (contrasting the dynamic court view with the constrained court view, and concluding that the constrained court view is more accurate); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 333–55 (2002); STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT (1970).

only happen at the political or social level.[108] There is not the same kind of debate about using other types of law to create change, although empirical work by social movement scholars has suggested that extra-legal organization is more likely to promote substantive equality.[109] Therefore, there should be that debate. Despite the number of legal victories by the Black rights movement and the women's movement, most scholars agree that neither group has achieved substantive equality. Some statistics demonstrate the continuing disparities in income, poverty rates, employment, and education.

For example, Black households have a median income of about $30,000, while White, non-Hispanic households have a median income just above $49,000.[110] Single female-headed households have a median income of just over $30,000, while single male-headed households have a median income of just over $43,000.[111] The median income of individual Blacks is just over $16,000, while for non-Hispanic Whites, it is nearly $27,500.[112] For women, the median income is about $31,500, while for men, it is just under $42,000.[113]

Poverty rates also present a picture of inequality. In absolute numbers, twice as many White families as Black families live in poverty, but proportionately, almost 25% of Black families live in poverty, while just under 9% of White families live in poverty.[114] Similarly, for single female-headed households, more than 28% live in poverty, while 13.5% of single male-headed households live in poverty.[115]

In terms of work force participation, about 60% of women are in the labor force, while about 75% of men are in the labor force.[116] Participation rates of Blacks and Whites are nearly identical to each other, but the unemployment rate of Blacks is 9.5% compared to only 4.1% for Whites.[117]

Educational attainment shows a similar disparity. In the White population, 24.4% have a bachelor's degree or higher,[118] while in the

108. *See* ROSENBERG, *supra* note 107, at 338; KLARMAN, *supra* note 49, at 5–7.

109. *See* Kenneth T. Andrews, *Creating Social Change: Lessons from the Civil Rights Movement, in* SOCIAL MOVEMENTS: IDENTITY, CULTURE, AND THE STATE 105, 105–17 (David S. Meyer et al. eds., 2002).

110. CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 4 (2005), *available at* http://www.census.gov/prod/2005pubs/p60-229.pdf.

111. *Id.*

112. *Id.* at 5.

113. *Id.*

114. *Id.* at 10.

115. *Id.*

116. BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION: DECEMBER 2006, at Table A-1, http://www.bls.gov/news.release/pdf/empsit.pdf.

117. *Id.* at A-2. The White participation rate is 66.2%, and the Black participation rate is 63.6%. *Id.*

118. *See* U.S. CENSUS BUREAU, TABLE 1A: PERCENT OF HIGH SCHOOL AND COLLEGE GRADUATES OF THE POPULATION 15 YEARS AND OVER, BY AGE, SEX, RACE,

Black population, only 14.4% have that same level of attainment.[119] More disturbing is the racial re-segregation that our schools have undergone. Most White students go to schools that are 80% White.[120] Three-fourths of Black and Latino students attend predominantly minority schools, and more than one in six Black children attend schools that are 99 % to 100% minority.[121] Urban public schools are attended primarily by Black and Latino students,[122] and segregation of those groups is closely linked to poverty.[123]

At the least, this smattering of statistics shows that disparities not only persist, but that the status of some Black people is regressing, despite all of the legal victories. These trends suggest that the law, by itself, is a poor effector of change. The next section explains some of the reasons that may be true.

V. THE PROCESS BY WHICH CULTURE BOTH CREATES NORMS AND PROVIDES SELF-REINFORCEMENT

A number of different disciplines have contributed explanations of why the law is not effective for radical social transformation. For example, chaos theory, or the theory of complex adaptive systems has been suggested as a metaphor for the way that law and society behave, and it suggests that laws will often produce unexpected results.[124] Certainly, in at least a lay sense, law as a practice is a sufficiently complex operation to make this comparison attractive. We like to think that the rules of the law are clear and uniformly applied, but the method of law's creation; the number of interpreters; and the process of interpretation make that not only unlikely, but practically impossible.

AND HISPANIC ORIGIN—WHITE ALONE AND BOTH SEXES (2004), http://www.census.gov/population/socdemo/education/cps2004/tab01a-02.pdf.

119. *See* U.S. CENSUS BUREAU, TABLE 1A: PERCENT OF HIGH SCHOOL AND COLLEGE GRADUATES OF THE POPULATION 15 YEARS AND OVER, BY AGE, SEX, RACE, AND HISPANIC ORIGIN—BLACK ALONE AND BOTH SEXES (2004), http://www.census.gov/population/socdemo/education/cps2004/tab01a-04.pdf.

120. ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 4, 27 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

121. *See id.* at 28.

122. *See id.* at 53–56.

123. *See id.* at 35–36.

124. *See, e.g.*, Thomas Earl Geu, *The Tao of Jurisprudence: Chaos, Brain Science, Synchronicity, and the Law*, 61 TENN. L. REV. 933, 934 (1994); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 852, 854 (1996). Some argue that the law *is* a complex adaptive system, while others say that the science simply proves a useful metaphor. I am not making a claim one way or the other, and need not since the point in this article is not to predict how the law will behave, but instead to describe why it behaves the way that it does.

Philosophy has contributed to the discourse on the subject. For example, Michel Foucault wrote extensively about the way that knowledge, or claims to truth, is organized by disciplines and institutions, which shape the way that people think and which perpetuate themselves by doing so.[125] Cognitive psychological research supports Foucault's description of the perpetuation of knowledge. Our perception is framed in fundamental ways by our beliefs.

The process is a natural one. The things in our world are infinitely varied, and if we had to process the impact of each variation we encountered, we would not be able to function.[126] And so, we define categories of things and then quickly sort what we encounter into those categories without reflection.[127] We use the definition of our categories to explain what the thing we have encountered is and how it is likely to act or be acted upon.[128] This sorting function allows quick judgments and makes our world seem more predictable.

Vital though the process is for our functioning, assigning a thing to a category, essentially creating group identity, has far reaching consequences. When an object is a part of a group, we perceive it as more like other objects within that group and less like objects outside of that group than we would if that object was not part of a group.[129] This process gets personalized when individuals are assigned group identities. Even when the distinction is arbitrary, like random team assignment, the individuals see members of their own group (the ingroup) as more like themselves, and others (the outgroup) as more different from themselves than they would without the group iden-

125. *See* MICHEL FOUCAULT, ARCHEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE (Rupert Swyer trans., Pan 1982) (1972); MICHEL FOUCAULT, THE BIRTH OF THE CLINIC: AN ARCHEOLOGY OF MEDICAL PERCEPTION (A.M. Sheridan Smith trans., Vintage Books 1994) (1973); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975); MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Vintage Books 1988) (1965); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES (Vintage Books 1994) (1970).

126. *See* Eleanor Rosch, *Human Categorization*, *in* STUDIES IN CROSS-CULTURAL PSYCHOLOGY 1, 1–2 (Neil Warren ed., 1977).

127. COGNITION AND CATEGORIZATION 27, 28 (Eleanor Rosch & Barbara B. Lloyd, eds., 1978).

128. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188–89 (1995).

129. *See id.* at 1186 (describing two studies and citing Henri Tajfel & A.L. Wilkes, *Classification and Quantitative Judgement*, 54 BRIT. J. PSYCHOL. 101, 104 (1963); Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83–86 (1969); and Donald T. Campbell, *Enhancement of Contrast as Composite Habit*, 53 J. ABNORMAL & SOC. PSYCHOL. 350, 355 (1956)).

tity.[130] People in a group are also much less able to see differences among members of the outgroup.[131]

Groups or categories are created by the salience of characteristics. Once a characteristic becomes salient (matters or makes a difference), like gender or race, that characteristic defines a group. But individuals define what is salient in any given context, often choosing what their culture defines as salient.[132]

One consequence of these cognitive structures is the tendency to stereotype, essentially a cognitive shortcut that links personal traits with group membership in order to simplify the task of perceiving, processing, and retaining information about people in memory.[133] Once set, stereotypes "bias[ ] in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people," influencing judgment continuously.[134] And just as for salience, which defines groupness in the first place, we decide what behaviors to attribute to particular groups.[135]

Stereotypes create expectations that transform the way individuals perceive others, remember things about others, and attribute reasons for the actions of others.[136] For example, we determine whether a particular person is suited for a job by comparing the stereotypes we associate with that person to the stereotypes we associate with the

130. *See* Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 58, 61 (David M. Messick & Ann E. Tennbrunsel eds., 1996); Anne Locksley et al., *Social Categorization and Discriminatory Behavior: Extinguishing the Minimal Intergroup Discrimination Effect*, 39 J. PERSONALITY & SOC. PSYCHOL. 773, 776–83 (1980); David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, *in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 213, 217 (David L. Hamilton ed., 1981).

131. David L. Hamilton & Tina K. Trolier, *Steroetypes and Stereotyping*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 127, 131 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

132. That is not to say that in every instance individuals make a conscious choice about what characteristics matter. Conscious adoption could happen, but individuals also absorb that information from exposure to the culture they live in. *See* HOWARD J. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 35 (1973); Richard Nisbett et al., *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 PSYCHOL. REV. 291, 291–92 (2001).

133. *See* Krieger, *supra* note 128, at 1187–88; Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321–22 (2000). While this description of what stereotypes are may sound very benign, stereotypes in society with power imbalances such as ours has operate to perpetuate and even aggravate those power imbalances.

134. Krieger, *supra* note 128, at 1188.

135. Again, this decision could be consciously adopted or learned through exposure to culture. *See* David L. Hamilton, *A Cognitive-Attributional Analysis of Stereotyping*, *in* 12 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 53, 64 (Leonard Berkowitz ed., 1979).

136. *See* Krieger, *supra* note 128, at 1200–09.

job.[137] And it is very difficult for people to defy the stereotypes others have of them. We remember the things a person actually did only if those actions fit our stereotypes of that person; we believe we remember a person doing things consistent with the stereotypes even if the person never did them; and we forget the things that did not conform to those stereotypes.[138] Additionally, we attribute reasons for the actions of people according to our stereotyped expectations, so that we assume a person who acts consistently with a stereotype acted because of innate characteristics, but a person who acts inconsistently with a stereotype acted because of transitional or situational factors.[139]

Thus, discrimination is accomplished at least in part through an ongoing process of interaction that often happens outside of our normal self-awareness, which manifests in many small things over time, and may culminate in larger actions. Stereotypes are also self-perpetuating, yet they do not function entirely automatically and can be confronted and changed by conscious effort.[140] Therefore, even though some discrimination may happen without full, contemporaneous self-awareness, it is still an appropriate subject of regulation by the government.[141]

137. *See id.* at 1200–04. Krieger uses the example of a small woman with paralegal training and a large man with physical education training both applying for a job as police officer to illustrate this point. If our stereotype of police officer includes a physically imposing person, we are more likely to perceive the large man as a better candidate. On the other hand, if our stereotype of a police officer includes a person able to defuse tense situations or apply the law correctly to particular conduct, we would be more likely to perceive the smaller woman with legal training as the better candidate. *See id.* at 1200–02.

138. *See id.* at 1207–10; Nancy Cantor & Walter Mischel, *Traits as Prototypes: Effects on Recognition Memory*, 35 J. PERSONALITY & SOC. PSYCHOL. 38, 41–45 (1977).

139. *See* Krieger, *supra* note 128, at 1204–07. A good example of such attribution bias is given by Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science To Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 401, 433–34 (2003). Because women with children are presumed innately to put the children, rather than their jobs, as their first priority, when such a woman is late to work, her boss is likely to assume that the innate characteristic of priority of childcare responsibilities were the cause. Because men are assumed to put work first, a man late for work is assumed to have been caught in traffic, a transitional cause.

140. *See* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 244–47, 255–56 (2002); Ann C. McGinley, *¡Viva la Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 430–32 (2000); JACK MEZIROW, TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING (1991); Jack Mezirow, *Transformation Theory of Adult Learning*, *in* IN DEFENSE OF THE LIFEWORLD: CRITICAL PERSPECTIVES ON ADULT LEARNING 39 (Michael R. Welton ed., 1995).

141. *See* Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 459, 478–79 (2003) (analogizing liability for discrimination caused by cognitive bias to the law related to dangerous conditions on land); Michael Selmi, Response, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233–34 (1999). *But see* Amy L. Wax, *Discrimination as Accident*, 74 IND. L. J. 1129, 1130–33 (1999).

However, that proves a problem for social movements. The way to substantive equality is, for at least some people, to agree to a redistribution of social and economic goods. But if belief systems are self-perpetuating and operate to shape perception outside of a person's normal awareness, the task for social movements is to figure out how to get people to realize what their belief systems are and that those belief systems should be changed.

Even more of a problem is the difficulty of law itself. First, law is usually a collective action. A large number of people work together to form the text that becomes the law. Each person knows the meaning of what he or she intends the law to mean, but those meanings can differ.[142] Divining what the end product means is not simply a search for truth, but a process of creating a fictional unitary meaning from a myriad of potential meanings.[143] A person's belief system will inform that process of divination. In fact, regardless of its source, the law must be interpreted by those who enforce it.[144] Each of those enforcers operates under his or her own set of cognitive biases. And so, unless all of the actors have the same belief system, divergent interpretations and applications of law are inevitable. Moreover, the more rigid and specific the law is, the less likely it will lead to uniform results.[145]

142. The elusive nature of statutory interpretation and how courts should engage in it has been debated by many. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 252–54 (1992) (describing the views of Judges Posner and Easterbrook in the Seventh Circuit, and Justice Scalia, the three most prominent voices in the current statutory interpretation debate). For more on the debate between Judge Posner, on the one hand, and Judge Easterbrook and Justice Scalia on the other, compare United States v. Marshall, 908 F.2d 1312, 1314–26 (7th Cir. 1990) (en banc) (Easterbrook, J.) with *id.* at 1331–38 (Posner, J., dissenting); *see* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 275 (1990) (discussing whether an objective method of statutory interpretation is possible); ANTONIN SCALIA, A MATTER OF INTERPRETATION 23–29 (1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (rejecting the notion that legislative bodies can have "intents"). For an alternate view of statutory interpretation, see *e.g.* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38-47 (1994) (describing and criticizing overreliance on the text to the exclusion of other interpretive tools).

143. I use "meaning" here in a very broad sense, not just to encompass what the particular words mean, but also what effect on the world they should have. And so, for example, most people might agree on the meaning to the word, "discrimination," but there will be significantly more divergence about whether any particular act will constitute discrimination. In other words, people may agree that discrimination is arbitrary, detrimental treatment of another, but may disagree whether arbitrary treatment of someone who is usually privileged is really discrimination.

144. I use "enforce" in a broad sense to include judges, administrators, bureaucrats, public officials, and even public employees: anyone who has some kind of power from a government body. The vast majority of government work goes unchallenged by the average person, and so that gives even the lowest level employees significant control to interpret for themselves the law that governs how they do their jobs.

145. John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEGAL PHIL. 47, 47 (2002).

Therefore, unless all of the actors have the same belief system and the same agenda as the group that sought the social change in the first place, the cognitive process will bend the law from its intended consequences. The law is subservient to the dominant culture, and so even when law is used to transform society, it usually gets transformed into a reinforcement of traditional values instead, unless society is also being transformed from within.

VI. CONCLUSION: THE ROLE OF LAW

This critique of law means only that law has a specially cabined place in any social movement. The law serves some important social values that, together with grassroots work, can make effective change. The key is that the majority of resources usually need to be devoted at the grassroots level.

Law is the appropriate tool to fix problems that the law alone has caused. For example, if the only relief that gay men and lesbians want is access to military jobs, and the only thing keeping them from those jobs is a law that prohibits their service, removing that law will accomplish that goal. The kinds of problems that are caused by law alone, though, are few.

The law also has an expressive function that communicates what we as a society value and what we do not value.[146] And so for the law to penalize something tells each of us that the thing penalized is not something we should value, and it may help to shape our belief systems in that way.[147] The longer the law has existed, the more effective this value may be. The expression of a value through law may also energize the grassroots movement or opponents of the movement.[148]

The law also plays a vital evolutionary function. Each incremental development in the law creates a new starting point from which to move forward. The cases striking down desegregation in one context after another, culminating in *Brown*, demonstrate that process. Additionally, one reason that women were able to eventually be protected by the Equal Protection Clause was because the courts had developed that area of analysis in the context of the Black rights movement first. And, one reason that the Court was able to strike down same-sex sodomy laws[149] was because it had developed a line of cases protecting bodily integrity and sexual autonomy for women.

146. *See* ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650 (2000); *See* Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021 (1996).

147. *See* KLARMAN, *supra* note 49, at 7.

148. *See id.*

149. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

Finally, the law can also operate as a backstop against backlash or ebbing of activism. Once the law is there, it continues to operate—or at least express its values—even if a counter-movement begins to protest it, and even if the original social movement loses support for continued forward momentum. At some point, these factors might create a change in the law, but until they do, the law continues to have some force.

And so, law has a role in social movements, but it lacks the power to make the kind of immediate transformation that we often expect it to. For that reason, social movements should be very strategic about how they allocate their resources to its pursuit.